

No. 15-15143

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RICHARD DENT; JEREMY NEWBERRY; ROY GREEN; J. D. HILL; KEITH  
VAN HORNE; RON STONE; RON PRITCHARD; JAMES MCMAHON;  
MARCELLUS WILEY; JONATHAN REX HADNOT, JR., On Behalf of  
Themselves and All Others Similarly Situated,  
*Plaintiffs-Appellants,*

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v.

NATIONAL FOOTBALL LEAGUE, a New York unincorporated  
association,  
*Defendant-Appellee.*

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On Appeal from the United States District Court for the  
Northern District of California, Hon. William H. Alsup, No. 3:14-cv-  
02324-WHA

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BRIEF FOR DEFENDANT-APPELLEE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees state the following:

The National Football League (“NFL”) is an unincorporated association of 32 member clubs organized under the laws of New York. The member clubs of the NFL are:

CLUBS	ENTITIES
Arizona Cardinals	Arizona Cardinals Football Club LLC; Arizona Cardinals Holding Company LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership; Baltimore Football Company LLC (general partner)
Buffalo Bills	Buffalo Bills, Inc.
Carolina Panthers	Panthers Football, LLC; P.F.F., Inc. (general partner)
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd.; JWJ Corporation (general partner)
Denver Broncos	PDB Sports, Ltd. d/b/a Denver Broncos Football Club; Bowlen Sports, Inc. (general partner)
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P.; RCM Sports and Leisure, L.P. (general partner); Houston NFL Holdings G.P., L.L.C. (general partner of RCM Sports)
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC; TDJ Football, Ltd. (general partner); Dar Group Investments, Inc. (general partner of TDJ Football)
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.

<b>CLUBS</b>	<b>ENTITIES</b>
Miami Dolphins	Miami Dolphins, Ltd.; South Florida Football Corporation (general partner)
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, L.L.C.; Benson Football, Inc. (general partner)
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	The Oakland Raiders; A.D. Football, Inc. (general partner)
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
St. Louis Rams	The St. Louis Rams, LLC
San Diego Chargers	Chargers Football Company, LLC; Alex G. Spanos (general partner)
San Francisco 49ers	Forty Niners Football Company LLC; San Francisco Forty Niners, LLC (general partner)
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Limited Partnership; Tampa Bay Broadcasting, Inc. (general partner)
Tennessee Titans	Tennessee Football, Inc.; Cumberland Football Management, Inc. (general partner)
Washington Redskins	Pro-Football, Inc.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

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## **STATEMENT OF JURISDICTION**

Appellants alleged jurisdiction under the Class Action Fairness Act. 28 U.S.C. § 1332(d)(2). After offering Appellants a chance to amend, the district court dismissed their complaint with prejudice on December 31, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF ISSUES**

1. Whether the district court properly dismissed Appellants' state-law negligence and fraud tort claims because they are preempted by the Labor Management Relations Act.

2. Whether Appellants' claims were properly dismissed for the additional reason that they admittedly failed to exhaust the binding grievance procedures under the parties' collective bargaining agreements.

## **PRELIMINARY STATEMENT**

This putative state-law class action was filed by ten former professional football players seeking damages for injuries allegedly caused by pain medications provided to them by the medical doctors and trainers of various National Football League (“NFL”) Clubs. Appellants have not sued the Clubs who employed them or the physicians and trainers who allegedly provided them with medications. Instead, Appellants seek to hold the NFL responsible for their alleged injuries under state tort law. They assert nine state-law claims, all of which are premised upon the allegation that the NFL breached a duty owed to them regarding the pain medications that they received from team doctors or trainers.

The district court granted the NFL’s motion to dismiss the Second Amended Complaint (“Complaint”) because resolution of Appellants’ claims would require interpretation of the collective bargaining agreements (“CBAs”) between the NFL and Appellants’ union, the National Football League Players Association (“NFLPA”). In a carefully considered opinion applying well-settled precedent, the district court held that the elements of Appellants’ tort claims—particularly the required showings of duty and reliance—could not be resolved without interpretation of the extensive CBA provisions governing the medical care to which NFL players are entitled for the treatment of injuries suffered during their employment.

Appellants seek to avoid this case-dispositive issue and contend that the district court misunderstood the Rule 12 dismissal standard, the law of labor preemption, and even the nature of their claims. But the district court did not err in relying on well-settled precedent and Appellants' own Complaint, which alleged common-law tort claims, not statutory violations. In all events, Appellants' allegations of "statutory" violations—which, among other deficiencies, never identify any statute that actually imposes a duty on the NFL—simply do not eliminate the need to interpret the numerous CBA provisions that address player medical care, including those that allocate rights and responsibilities for such care between and among teams, team doctors and trainers, and the players themselves. Their Complaint was properly dismissed.

## **STATEMENT OF THE CASE**

### **A. Statutory Framework**

Section 301 of the Labor Management Relations Act governs "[s]uits for violation of contracts between an employer and a labor organization[.]" 29 U.S.C. § 185(a). In enacting this provision, Congress sought to ensure that collective bargaining agreements, which govern the relationship between unionized workers and their employers, would be given a uniform interpretation under federal law. Because allowing collectively bargained terms to have "different meanings under state and federal law" would "inevitably exert a disruptive influence upon both the

negotiation and administration of collective agreements,” Section 301 preempts any state-law claim that is “substantially dependent” on, or “inextricably intertwined” with, the terms of a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11, 213, 220 (1985). All disputes over “what the parties to a labor agreement agreed,” and what constitutes a breach of such an agreement, must be resolved only under “uniform federal law” rather than “in a suit alleging liability in tort.” *Id.* at 211; accord *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 693 (9th Cir. 2001) (Section 301 preempts any claim that “necessarily requires the court to interpret an existing provision of a CBA that can reasonably be said to be relevant to the resolution of the dispute.”).

## **B. Background**

### *1. Appellants’ Common-Law Claims*

Appellee NFL is an unincorporated association of thirty-two separately owned and independently operated professional football Clubs. ER 2-3. Appellants—Richard Dent, Jeremy Newberry, Roy Green, J.D. Hill, Keith Van Horne, Ron Stone, Ron Pritchard, James McMahon, Marcellus Wiley, and Jonathan Rex Hadnot, Jr.—are former football players who were employed by, and played for, various Clubs between the 1969 and 2012 NFL seasons. ER 3. During their playing careers, all were represented by the NFLPA, the exclusive collective bargaining representative of all NFL football players. ER 1267.

On behalf of a putative class of more than 1,000 retired NFL players who played in the League over forty-three years, Appellants bring common-law negligence and fraud claims against the NFL (but not against their employer clubs or against the team doctors or trainers who treated them) on the theory that the NFL breached a “duty of reasonable care” with respect to player medical care. ER 1352-73. Appellants assert nine state-law tort claims: (1) declaratory relief; (2) medical monitoring; (3) fraud; (4) fraudulent concealment; (5) negligent misrepresentation; (6) negligence per se; (7) loss of consortium; (8) negligent hiring of medical personnel; and (9) negligent retention of medical personnel. *Id.*; ER 3-4. Appellants make general allegations about violations of the Controlled Substances Act, the Food, Drug, and Cosmetic Act, unidentified “corresponding [state] laws,” and the American Medical Association Code of Ethics, but they assert no claims under those authorities themselves. ER 1303-16; *see* ER 19.

The gravamen of Appellants’ claims is that “doctors and trainers”—who were employed or retained by the individual NFL member clubs and not the NFL—gave players medications without proper recordkeeping and without telling them what they were taking or the possible side effects, and that the NFL violated a duty of reasonable care by, among other things, failing to demand proper accountability from Club medical staffs and failing to warn players of the dangers of the medications. ER 1333. Appellants further assert that the NFL can be held

liable for the negligent hiring and retention of doctors and trainers by the individual Clubs. ER 1371-72.

Appellants claim to have suffered a variety of injuries. Although several of the named plaintiffs began playing in the 1960s and 1970s (ER 1295, 1296, 1298), the Complaint alleges that no player had “good reason to know of” the dangers of the allegedly improper administration of drugs by team doctors and trainers “until recently.” ER 1301. They seek declaratory and injunctive relief, medical monitoring, and compensatory and punitive damages. ER 1373-74.

The Complaint does not, and could not, allege that Appellants or prospective class members exhausted their remedies under the NFL’s collectively bargained mandatory dispute resolution procedures. Those procedures require arbitration of any dispute involving “the interpretation of, application of, or compliance with, any provision of” the CBAs “pertaining to terms and conditions of employment of NFL players.” *E.g.*, ER 517-18, 985.

2. *The District Court Dismisses All Nine of Appellants’ Claims As Preempted.*

The NFL moved to dismiss the Complaint on several grounds, arguing that all of Appellants’ nine state-law claims: (1) were preempted by the Labor-Management Relations Act, ER 1259-85; and (2) separately failed to state a claim upon which relief could be granted in light of, *inter alia*, the expiration of the statute of limitations, failure to plead the fraud claims with particularity as required

by Rule 9(b), and failure to allege facts that would plausibly show that the NFL could be held responsible for the alleged negligent hiring and retention of *team* doctors and trainers by the Clubs. ER 464-96.

After full briefing and oral argument—including several rounds of post-hearing supplemental briefing on preemption and exhaustion issues—the district court granted the NFL’s motion to dismiss on preemption grounds (while denying as moot dismissal on the remaining grounds). The Court concluded that all of Appellants’ claims were preempted because resolving them would require interpretation of the numerous “player medical care” CBA provisions that “[t]he union and the league have bargained extensively over [] for decades.” ER 12.<sup>1</sup>

At the outset, the district court recognized that evaluating whether the NFL acted negligently or “with reasonable care” (ER 1352) would require more than simply evaluating whether the League (or someone under its control) violated federal or state law. ER 8. Instead, because Appellants’ state-law claims included as elements whether the NFL owed a common-law duty of care related to player medical care, as well as the scope and breach of any such duty, resolution of Appellants’ claims would implicate dozens of “detailed provisions in numerous

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<sup>1</sup> Appellants conceded below that certain brief “gap” periods in CBA coverage or variations in CBA language over time did not affect the preemption analysis. ER 20 (rejecting “gap” argument).

collective-bargaining agreements between the players' union and the NFL from 1968 onward" concerning those topics. *Id.* As the district court explained,

During the bargaining pursuant to the National Labor Relations Act, the players and the league imposed numerous duties upon the clubs for the protection of the players' health and safety. Through these CBAs, players' medical rights have steadily expanded. These provisions cover, among other things, the duties of individual clubs to hire doctors and trainers and to provide medical care and information to players.

*Id.*

The district court reviewed (ER 8-11) how the NFL (on behalf of the Clubs) and the NFLPA (on behalf of the players) have agreed since 1971 on the Clubs' duties regarding the availability of physicians and trainers and the provision of medical care:

- to provide a physician and an ambulance for players at home games (since 1971) (ER 1037);
- to impose a process for Club physicians to document expected player recovery time (since 1980) (ER 1054);
- to ensure that return-to-play decisions are made "by the Club's medical staff and in accordance with the Club' medical standards" (since 1980) (ER 1054);
- to hire a board-certified orthopedic surgeon at Club expense (since 1982) (*e.g.*, ER 587-88, 980);
- to hire only trainers certified by the National Athletic Trainers association and requiring that part-time trainers be supervised by certified trainers (since 1982) (*e.g.*, ER 588, 981);

- to afford players the “Right to a Second Medical Opinion,” as well as the right to have medical care provided at the team’s expense by a surgeon of the player’s choice (since 1982) (*e.g.*, ER 588, 982);
- to have a comprehensive program to “treat, care for and eliminate chemical dependency problems of players” and to evaluate players, upon reasonable cause, for chemical abuse or dependency problems (since 1982) (*e.g.*, ER 588-89, 982-83);
- to provide a right to medical care for playing-related injuries and to ensure that Club physicians are free to make the proper determination as to the scope of that care (since 1993) (*e.g.*, ER 656, 1025);
- to deter and detect substance abuse and “to offer programs of intervention, rehabilitation, and support” for players with substance abuse problems (since 1993) (*e.g.*, ER 623, 982-83);
- to designate a “Team Physician for Substance Abuse” to monitor players’ involvement and treatment in the drug program (since 1997) (*e.g.*, ER 1071, 1101); and
- to hire board-certified doctors trained in internal medicine, family medicine, or emergency medicine, as well as at least two full-time certified trainers (since 2011) (ER 980).

In addition to these Club duties, the CBAs also have required Club physicians:

- to advise players of any physical condition that will adversely affect the player’s health and to provide players with access to their medical records (since 1982) (*e.g.*, ER 587-88, 980);
- to conduct a standardized minimum pre-season physical (since 1982) (*e.g.*, ER 588, 982);
- to provide notice to players “in writing” of physical conditions that could adversely affect the player’s health before they are permitted to return to the field (since 1993) (*e.g.*, ER 622, 980);

- to provide whatever medical and hospital care during the player’s contract that “the Club physician may deem necessary” (since 1993) (*e.g.*, ER 656, 1025);
- to owe, “if it was not already clear” (ER 10), his or her “primary duty in providing player medical care . . . not to the Club but instead to the player-patient” (since 2011) (ER 980); and
- to comply (again, “if it was not already clear”) with all federal, state, and local requirements, including all medical ethical standards (since 2011) (ER 980).

The CBAs additionally impose certain duties on players, including a requirement that they provide the Club physician with a “full and complete disclosure of any physical or mental condition” that could impact their performance under their contract. *E.g.*, ER 656, 1025.<sup>2</sup>

In light of these provisions, the district court rejected Appellants’ argument that their claims would not require CBA interpretation: “While these protections do not specifically call out the prescribing of drugs and painkillers, they address more generally medical care, player health, and recovery time, and proper

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<sup>2</sup> Various CBA provisions also guarantee comprehensive no-fault benefits related to health and safety to current and former players (including for injuries suffered from medication use and abuse), such as: (1) guaranteed workers’ compensation (or equivalent) benefits; (2) benefits for disability based on the use of, addiction to, or dependence upon any controlled substance; (3) “injury protection pay,” which protects players who sustain a qualifying injury in one season that results in his contract termination; (4) “termination pay,” which provides for the payment of the rest-of-year salary upon mid-season termination under certain conditions; and (5) a benefit for players with dementia and certain other disorders. ER 71-81. A complete copy of the current CBA is available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

administration of drugs can reasonably be deemed to fall under these more general protections.” ER 12. The court further concluded that “the right to medical care established by the CBAs, . . . presumably included and still includes proper medical care in accordance with professional standards—including for the administration of drugs and painkillers—or at least a fair question of interpretation in that regard is posed.” *Id.*

Turning to Appellants’ four negligence claims, the district court properly asked whether CBA interpretation would be necessary for Appellants to prove the affirmative elements of their claims, including the critical question of the NFL’s duty. The court noted that “no decision in any state” has ever recognized that the NFL (or any other professional sports league) has a common-law duty to police player health and safety, particularly the medical care that they receive for injuries sustained while employed by their Clubs. ER 7. Nevertheless, even assuming that such a duty existed, the court recognized:

In determining the extent to which the NFL was negligent in failing to curb medication abuse by the clubs, it would be essential to take into account the affirmative steps the NFL has taken to protect the health and safety of the players, including the administration of medicine. The NFL addressed the problem of adequate medical care for players in at least one important and effective way, *i.e.*, through a bargaining process that imposed uniform duties on all clubs—without diminution at the whim of individual state tort laws. Therefore, the NFL should at least be given credit, in any negligence equation, for the positive steps it has taken and imposed on the clubs via collective bargaining.

ER 13.

The district court concluded that for Appellants to establish either the scope of the NFL's asserted duty or any breach thereof, "it would be necessary to consider the ways in which the NFL has indeed stepped forward and required proper medical care—which here prominently included imposing specific CBA medical duties on the clubs." ER 14. It would also be necessary to determine whether, and to what extent, other entities or individuals (such as the Clubs themselves or team doctors) in fact owed the duties that Appellants alleged the NFL had breached. *Id.* Thus, all four of Appellants' negligence-based claims were held preempted. ER 13.

The district court held Appellants' fraud claims preempted for similar reasons. In evaluating the elements of the claims, the court recognized that "it would be necessary to interpret the CBA provisions on the disclosure of medical information to determine whether plaintiffs reasonably relied on the alleged lack of proper disclosure by the NFL." ER 22.

These included provisions requiring "a Club physician" to "advise the player" of a "physical condition which adversely affects the player's performance or health" if the Club physician has advised a coach or other Club representative of such condition, to make "[a]ll determinations of recovery time for major and minor injuries . . . in accordance with the club's medical standards," and to advise a player "in writing before the player is again allowed to perform on-field activity"

whenever his condition could be worsened by a return to the field. ER 622, 908, 1054. Citing an Eighth Circuit decision finding preempted common-law claims brought by former players against the NFL, *Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009), the district court held that adjudicating whether Appellants' reliance on the NFL's actions and omissions was justifiable or reasonable would require interpretation of the many CBA provisions "on the disclosure of medical information." ER 22. Therefore, Appellants' fraud claims were preempted. The court further held that it was undisputed that Appellants' remaining claims were all derivative of Appellants' substantive claims, and therefore were preempted as well. *Id.*

In dismissing all of Appellants' claims, the district court considered and rejected every argument that Appellants make here. First, it rejected the argument that because Appellants sued only the League and not the "teams, team doctors or trainers," the NFL's duties could be analyzed "separate and apart from the duties owed by the individual clubs and their medical personnel." ER 14. That was "simply not true." *Id.* Quite the opposite: it would "be impossible for the Court to analyze whether the NFL acted negligently, and whether the NFL's conduct caused the players' injuries, without consulting the specific CBA provisions that cover the individual clubs' duties to the players." ER 14-15. Thus, "[c]ontrary to plaintiffs' arguments, the lengths the NFL has gone in imposing duties on the clubs to protect

the health and safety of the players cannot be ignored in evaluating whether or not it has been careless.” ER 14.

Second, the court rejected Appellants’ argument that their claims were not preempted because they were ostensibly based on “illegal conduct” under various federal and state statutes. ER 18-19. The district court recognized that while “the operative complaint here alleges violations of federal and state statutes,” it did so “only as an antecedent and predicate for follow-on *state common law claims*,” and “[n]o right of action is allowed or asserted under the statutes themselves.” ER 19. Moreover, the court recognized that Appellants’ argument “misunderstands the Supreme Court’s holding on this issue of illegality,” which provides only that a CBA cannot preempt state-law rules that “proscribe conduct, or establish rights and obligations, independent of a labor contract.” ER 18 (quoting *Allis-Chalmers*, 471 U.S. at 211-12). It does not mean that merely alleging “illegal action” avoids preemption.

Finally, the court rejected Appellants’ argument that they “cannot grieve and arbitrate their claims against the NFL through the procedures set forth under the CBAs[.]” ER 19. The district court noted that NFL players (including retired players) and their union have a history of grieving and arbitrating disputes by and against the NFL Clubs and the NFL in health and safety matters. ER 20; *see also* ER 84-86. Although “preemption does not require that the preempted state law

claim be replaced by an analogue claim in the collective-bargaining agreement,” “[n]evertheless the types of claims asserted in the operative complaint are grievable in important respects under the various CBAs.” ER 20.

The district court offered Appellants an opportunity to file a motion for leave to amend their claims. ER 23. After Appellants failed to do so, the court entered final judgment dismissing all claims with prejudice on December 31, 2014. ER 1.

### **C. The *Evans* Litigation**

Shortly after the district court dismissed the complaint, the same counsel representing Appellants below filed a “related” federal lawsuit with different named plaintiffs but on behalf of the same putative class that they purport to represent here—only this time suing the thirty-two member Clubs rather than the NFL. *Evans v. Arizona Cardinals Football Club, LLC et al.*, No. 1:15-cv-01457 (D. Md. filed May 21, 2015). The allegations in *Evans* are nearly identical to the allegations in this case, except the plaintiffs there seek to place responsibility for their allegedly deficient medical care not on the NFL but on the individual Clubs.

For example, the *Evans* complaint alleges that Club physicians and trainers did not provide adequate or accurate explanations of side effects and long-term health consequences of medications used to treat the players during their NFL careers, and that every member of the purported class sustained injuries “which were exacerbated by the Clubs’ administration of [m]edications to keep players on

the field or in practice.” *Evans* Compl. ¶ 13. The Clubs have filed a motion to dismiss the complaint and a motion to transfer to the United States District Court for the Northern District of California as a related case. *Evans*, Dkt. Nos. 23-24. Those motions are fully briefed and pending.

### **SUMMARY OF THE ARGUMENT**

**I.** Appellants’ nine state-law tort claims were properly dismissed as preempted under the Labor Management Relations Act. That Act requires preemption and dismissal of state-law claims that can be resolved only by interpreting a CBA.

The district court correctly held that resolving each of Appellants’ claims would necessarily require it to interpret and construe multiple CBA provisions intertwined with Appellants’ claims about the medical care and medical disclosures that they received (or failed to receive) from Club physicians and trainers. A court could not determine whether the NFL assumed a duty of care to players, or whether it acted reasonably or negligently, without interpreting the myriad CBA provisions pertaining to player health and safety—as well as how those provisions allocate rights and responsibilities for player medical care between and among the NFL, the Union, the Clubs, team doctors and trainers, and the players themselves. Nor could the court determine whether the NFL was liable for fraudulently disclosing or failing to disclose material information about medications without determining

whether Appellants justifiably relied on any such statements and omissions from the NFL (as opposed to those of the doctors and trainers who treated them) in light of the CBA. Because all of Appellants' claims require CBA interpretation, all are preempted.

Contrary to Appellants' argument, the district court did not misunderstand either the factual or legal basis for their claims. In accordance with settled law requiring courts to evaluate the "nature" of Appellants' claims—and relying on Appellants' allegations, concessions, and characterizations of their own Complaint—the court properly determined that the dozens of CBA provisions about player medical care and benefits were centrally relevant to Appellants' suit and that it would be "impossible" to ignore those provisions in evaluating the NFL's liability for negligence or fraud.

Appellants argue on appeal that, in reality, they brought claims "exclusively" premised on violations of the Food, Drug and Cosmetic Act and the Controlled Substances Act (and unidentified "corresponding state statutes"), rather than on violations of the common-law duties that they alleged in their complaint. Not so. Appellants fail to provide any explanation as to how these statutory provisions, which provide no private right of action and which plainly regulate the conduct of doctors and other registered individuals who prescribe and administer medications, could even apply to the NFL. Moreover, even assuming these statutory provisions

could apply to the NFL, Appellants' claims would still be preempted because the standards imposed by these statutes at most merely inform—rather than supplant—the common law analysis. Resolving the elements of Appellants' claims would still require interpretation of the CBAs, mandating a finding of preemption.

**II.** Appellants' claims are also subject to dismissal on an independent ground: they are subject to mandatory, unexhausted CBA grievance procedures. Although Appellants' claims are grievable in important respects (as the district court recognized), Appellants have never alleged, and cannot allege, that they exhausted the CBA's mandatory grievance procedures. Accordingly, preemption aside, they cannot bring these claims without first having satisfied the contractual requirements that their union negotiated.

## **ARGUMENT**

### **I. APPELLANTS' NINE STATE-LAW CLAIMS ARE PREEMPTED UNDER THE LABOR MANAGEMENT RELATIONS ACT.**

#### **A. Section 301 Of The Labor Management Relations Act Preempts State-Law Claims That Require Interpretation Of A Collective Bargaining Agreement.**

It is well-settled that Section 301 of the Labor Management Relations Act ("LMRA") preempts state-law claims whose resolution "is inextricably intertwined with terms in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985). If "any attempt to assess liability" on a tort claim "inevitably will involve contract interpretation," that claim is preempted. *Id.*; see *International*

*Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 862 (1987) (preemption appropriate when “questions of contract interpretation . . . underlie any finding of tort liability”) (quoting *Allis-Chalmers*, 471 U.S. at 218). Indeed, preemption applies whenever adjudicating an “element” of the claim would “require[] a court to interpret any term of a collective-bargaining agreement.” *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988); accord *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1062 (9th Cir. 1989) (test is whether “the presence of the necessary elements of a state claim can be ascertained without recourse to interpretation of the CBA”).

A plaintiff may not avoid the preemptive force of the LMRA by strategically avoiding “any direct reference to the collective bargaining agreement that controlled his employment.” *Hyles v. Mensing*, 849 F.2d 1213, 1214 (9th Cir. 1988). Rather, the “plaintiff’s claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff’s claim.” *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001).

In accordance with these principles, Section 301 has been “broadly construed” to preempt *all* state-law claims—whether based in contract, tort, or statute—that require interpretation of a collective bargaining agreement. *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1016 (9th Cir. 2000); *see, e.g., Audette v. Int’l Longshoremen’s & Warehousemen’s Union*, 195 F.3d 1107, 1113

(9th Cir. 1999) (state-law statutory claim preempted by LMRA). “If the plaintiff’s claim cannot be resolved without interpreting the applicable CBA . . . it is preempted. . . . Alternatively, if the claim may be litigated without reference to the rights and duties established in a CBA . . . it is not preempted.” *Cramer*, 255 F.3d at 691. Moreover, the defendant’s “proffered interpretation argument” regarding the link between the plaintiff’s claims and the CBA must at least “reach a reasonable level of credibility.” *Cramer*, 255 F.3d at 691-92.

**B. Resolving All Nine Of Appellants’ Claims Requires CBA Interpretation.**

Appellants’ complaint comprises three categories of common-law claims against the NFL: (1) negligence claims (negligent misrepresentation, negligence per se, negligent hiring, and negligent supervision); (2) fraud claims (fraud and fraudulent concealment); and (3) derivative claims (loss of consortium, declaratory judgment, and medical monitoring). The district court analyzed and dismissed all nine claims after concluding that resolving each would necessarily require the court “to interpret”—*i.e.*, “to consult, construe, and apply,” ER 13, not just to “look[] to,” Appellants’ Br. 17—dozens of CBA provisions. That decision, which is reviewed de novo, *Cramer*, 255 F.3d at 689, was correct and consistent with both Circuit law and the many other cases finding similar claims against the NFL and other sports organizations preempted.

1. *The Negligence Claims Were Properly Dismissed.*

The district court properly dismissed Appellants' four negligence-based claims (claims 5, 6, 8, and 9) as preempted by the LMRA. ER 21. The four elements these claims share are (1) duty; (2) breach; (3) proximate cause; and (4) damages. *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (citing California law). As the district court held, to adjudicate whether the NFL violated a duty of care to the players regarding medical care, a federal court would be required "to consult, construe, and apply what was required by" dozens of CBA provisions directly related to that issue. ER 13.<sup>3</sup>

a. Appellants allege that the NFL "voluntarily undertook a duty to act with reasonable care toward" them. ER 1352; *see, e.g.*, ER 1346-47 (among questions "common" to the entire class are whether "the NFL voluntarily undert[ook] [a] duty of care toward the Class Members"). Negligence claims are preempted by the LMRA when interpretation of a CBA is required to ascertain either the existence of "an implied duty of care on the [defendant]" or "the nature and scope of that duty." *Hechler*, 481 U.S. at 862; *see Brown v. Brotman Med. Ctr., Inc.*, 571 F. App'x 572, 576 (9th Cir. 2014) (preemption appropriate where

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<sup>3</sup> Appellants have never identified any specific state laws underlying their claims. Like the district court below, the NFL will cite the substantive common law of California for illustrative purposes.

CBA interpretation required “to determine the standard of care that [the defendant] agreed to assume and, in turn, whether [its] actions violated that duty”).

Appellants’ negligence claims are preempted because determining whether and to what extent the NFL assumed a duty of reasonable care—let alone breached any such duty—would require CBA interpretation in at least three ways.

First, a court would have to interpret the CBA to determine whether the NFL even could assume a duty of care related to players’ medical treatment. The district court recognized that “[t]here is simply no case law that has imposed upon a sports league a common law duty to police the health-and-safety treatment of players by the clubs,” ER 7, and the most recent CBA confirms that the NFL has never undertaken such a duty: “Nothing in this Article, or any other Article in this Agreement, shall be deemed to impose or create any duty or obligation upon either the League or NFLPA regarding diagnosis, medical care and/or treatment of any player.” ER 982. At a minimum, for Appellants to prevail on their negligence claim, a court would need to interpret this provision (and earlier CBAs to ascertain whether such a provision was implicit in them) to determine whether the League, in fact, assumed any extra-contractual duty related to medical care and treatment to the players.<sup>4</sup>

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<sup>4</sup> For instance, prior CBAs have long allocated primary responsibility for examining health and safety issues to entities besides the NFL. *See, e.g.*, ER 98, 991 (Joint Committee on Player Safety and Welfare, which is made up of three

Second, determining the scope of the NFL's duty of care would require, as the district court held, taking "into account what the NFL has affirmatively done to address the problem" of ensuring player health and safety through collective bargaining, "not just what it has not done." ER 8; *id.* at 13 ("The NFL addressed the problem of adequate medical care for players in at least one important and effective way, *i.e.*, through a bargaining process that imposed uniform duties on all clubs—without diminution at the whim of individual state tort laws."). Determining whether the NFL acted negligently by breaching its voluntarily assumed "duty of reasonable care" requires taking into account *all* the actions the NFL has taken—not just the (allegedly) negative ones. ER 8.

Finally, it also would be necessary to interpret the CBAs to determine the scope of the obligations the NFL and Clubs have adopted vis-à-vis the "individual clubs' physicians and trainers." ER 22; *Hechler*, 481 U.S. at 860 ("The threshold inquiry for determining if a [negligence] cause of action exists is an examination of the [CBA] to ascertain what duties were accepted by each of the parties and the scope of those duties."). Relying on cases throughout the country holding similar claims against the NFL preempted, the district court recognized that "because the CBAs expressly and repeatedly allocate so many health-and-safety duties to the clubs"—including to Club physicians—"the CBAs can fairly be interpreted, by

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NFLPA representatives and three *Club* representatives, authorized to "examine any subject related to player safety and welfare it desires").

implication, to negate any such duty at the league level.” ER 15. “Even if this interpretation were ultimately rejected, it is a fair one and that is sufficient for Section 301 preemption.” *Id.*

**b.** Appellants’ negligent hiring and retention claims (claims 8 and 9) allege that the NFL assumed a duty to “hire and retain educationally well-qualified, medically-competent, professionally-objective and specifically-trained professionals not subject to any conflicts of interest.” ER 1371. But, as Appellants concede, the NFL does not hire and retain the doctors and trainers who provide medical care to players; the individual Clubs do. *E.g.*, ER 293 (referring to “the ‘doctors and trainers’ of each of the NFL’s 32 teams”). Thus, the only possible way the *NFL* could be held liable for negligence in hiring or supervision of medical professionals would be through some duty or obligation the NFL voluntarily assumed.

The sources of that duty—if any such duty exists—are the CBAs, and the court could not possibly determine the existence or scope of that duty without interpreting specific provisions of the CBA. The CBAs specifically address the minimum qualifications for hiring physicians and trainers “by requiring each club to retain a ‘board-certified orthopedic surgeon’” and full-time trainers “certified by the National Athletic Trainers Association.” ER 13; *see* ER 980 (requiring physicians to “comply with all federal, state, and local requirements”). Thus, to

determine whether the NFL could be held to have acted negligently in relation to physician or trainer hiring, a court would need to resolve such interpretive issues as whether the NFL assumed some duty beyond these provisions, as well as how these CBA provisions might eliminate, diminish, or otherwise affect whatever duty the NFL voluntarily assumed. In short, “this Court would need to interpret what the NFL has already required in [these] various CBA provisions[.]” ER 13.

c. “The same analysis applies to plaintiffs’ claims for negligent misrepresentation and negligence per se [claims 5 and 6].” ER 13. Their claim for negligent misrepresentation alleges that the NFL “undertook the duty” to “act with reasonable care toward the Class Members” by disclosing to them the “dangers of the Medications.” ER 1367. Similarly, regarding negligence per se, Appellants “claim that the NFL had a duty to follow federal and state laws regarding medications and to ‘act with reasonable care toward the Class Members.’” ER 13 (citing Complaint ¶¶ 355, 370-80, 386 [ER 1367-1371]).<sup>5</sup>

As the district court recognized, however, the CBAs already contain such disclosure and compliance obligations—but place them squarely on Club

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<sup>5</sup> Because “negligence per se” is not a distinct claim but rather a rebuttable presumption used in certain negligence cases, “an underlying claim of ordinary negligence must be viable” before the negligence per se doctrine can come into play. *California Serv. Station & Auto Repair Ass’n v. Am. Home Assurance Co.*, 62 Cal. App. 4th 1166, 1178 (1998); see, e.g., *Spencer v. DHI Mortg. Co.*, 642 F. Supp. 2d 1153, 1162 (E.D. Cal. 2009) (“[I]n the absence of [a] viable duty, plaintiffs’ negligence per se claim fails just as plaintiffs’ negligence claim fails.”).

physicians, not on the NFL. For example, the CBAs provide that “*the physician will advise the player*” of dangerous conditions, including injuries that could stem from a premature return to “on-field activity.” ER 13-14 (emphasis added). The CBAs further require physicians to offer “precise” prognoses of the player’s physical condition and recovery time, “to disclose to a player any and all information about the player’s physical condition,” and to “*comply with all federal, state, and local requirements[.]*” ER 980, 1054 (emphasis added). As the district court recognized, it would be “impossible to determine the scope of the NFL’s duties in relation to misrepresentation of medical risks, and whether the NFL breached those duties,” without interpreting these CBA provisions. ER 14.

**d.** Moreover, given that the NFL indisputably does not retain or employ doctors or trainers and owes no common-law duty to Appellants, ER 15, to the extent that the NFL did “voluntarily assume” any duty to the players regarding medical care, it was necessarily assumed through the CBA governing their relationship, and Appellants’ claims are preempted on that ground as well. *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 369 (1990) (“[A] state-law tort action . . . may be pre-empted by § 301 if the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement[.]”); *see Atwater v. Nat’l Football League Players Ass’n*, 626 F.3d 1170, 1179 (11th Cir. 2010) (whether duty “arose directly from” CBA or substantially depends on

interpretation of CBA are alternative grounds for preemption); *see, e.g., Duerson v. Nat'l Football League, Inc.*, No. 12-C-2513, 2012 WL 1658353, at \*4 (N.D. Ill. May 11, 2012) (“Even if the NFL’s duty arises apart from the CBAs, therefore, the necessity of interpreting the CBAs to determine the standard of care still leads to preemption.”).<sup>6</sup>

## 2. *The Fraud Claims Were Properly Dismissed.*

The district court also dismissed Appellants’ fraud and fraudulent concealment claims (claims 3 and 4) because “the same arguments regarding the necessity of interpreting the CBAs applies to both fraud-based claims here.” ER 22. As with negligence claims, “section 301’s preemptive force extends to fraud claims when resolution of the claims is inextricably intertwined with terms in a labor contract.” *Aguilera*, 223 F.3d at 1016; *see, e.g., Bale v. Gen. Tel. Co. of Cal.*, 795 F.2d 775, 780 (9th Cir. 1986) (finding negligent misrepresentation and fraud claims preempted under LMRA).

**a.** “The elements of fraud are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage.” *Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 960 (9th Cir. 2013). Fraudulent concealment additionally requires that the defendant be “under a duty to disclose

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<sup>6</sup> Appellants incorrectly state (Br. 16) that the NFL “agree[s]” that the duty it owes, if any, did not arise from the CBA. The NFL does not agree. *See, e.g.*, ER 190-92 (Tr. 17:18-19:2) (arguing that “the fundamental duty to provide the medical care here arose from the CBA”); ER 221-22 (Tr. 48:18-49:3) (similar).

the fact to the plaintiff.” *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1131 (9th Cir. 2014). Appellants allege that the NFL acted fraudulently by, among other things, “hid[ing] the dangers” of certain medications from the players (ER 1361-62, 1364); forcing injured players to return to the field too quickly (ER 1359); and denying players the opportunity for “independent and objective medical diagnoses” (*id.*).

**b.** It is undisputed that Appellants’ fraud and fraudulent concealment counts (as well as their negligent misrepresentation count) depend on a showing of “justifiable reliance.” ER 1363-64, 1368 (alleging “Class Members’ reasonable and justifiable reliance on the NFL’s” representations and omissions). Yet whether the players’ reliance on “the NFL’s statements and silences about the danger [of] such Medications” (ER 1368) could be considered “justifiable” or “reasonable” would require interpretation of the CBA, which places the player health disclosure obligations on *Club physicians*, not on the NFL or the Clubs. *See, e.g.*, ER 622, 980 (requiring physicians to “advise the player” about any condition affecting player health, including in some cases “in writing”). In addition, the CBAs granted the players the rights to second medical opinions and treatment by their own doctors at Club expense, to select their own surgeon and have surgery performed at Club expense, and to receive copies of their medical records from the Club and Club physicians. *See, e.g.*, ER 587-88, 836, 980, 982. The court could not resolve

whether a player reasonably relied on something his team doctor or trainer said (or did not say) without interpreting these provisions.

Citing an Eighth Circuit decision dismissing similar failure-to-warn fraud allegations by former players against the NFL, the district court recognized that Appellants “cannot demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA[.]” ER 22 (quoting *Williams*, 582 F.3d at 881). Thus, “[i]t would be necessary to interpret the CBA provisions on the disclosure of medical information to determine whether plaintiffs reasonably relied on the alleged lack of proper disclosure by the NFL.” ER 22; *see also Atwater*, 626 F.3d at 1183 (dismissing misrepresentation claims where “determination of whether Plaintiffs reasonably relied on Defendants’ alleged misrepresentations is substantially dependent on” an interpretation of CBA provisions); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1177-79 (N.D.N.Y. 1990) (fraud claim required interpretation of CBA provisions “establish[ing] the duty of a club physician, and arguably the club,” to warn players about adverse health conditions).

c. Appellants’ fraud claims are subject to dismissal for the additional reason that where, as here, such claims are based (at least in part) on an *omission* of material information, the plaintiff must show that the defendant was “under a duty to disclose the fact to the plaintiff.” *Fresno Motors*, 771 F.3d at 1131. As

explained above, the court could not determine whether the NFL (versus Clubs or Club medical staffs) was under any obligation to disclose particular information about prescription drugs without evaluating numerous CBA provisions, including those provisions imposing notification requirements on Club medical staffs. *Section I.B.1, above.*

### 3. *The Derivative Claims Were Properly Dismissed.*

Finally, the district court correctly found (and Appellants do not contest) that Appellants’ three remaining claims—for a declaratory judgment, medical monitoring, and loss of consortium (claims 1, 2, and 7)—are all “derivative of” the negligence and fraud counts and thus “fail for the same reason.” ER 22. The Declaratory Judgment Act, for example, does not create a freestanding cause of action, but rather provides a procedural alternative to vindicating a legal right. *Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014) (“[Declaratory Judgment Act] statute does not create new substantive rights, but merely expands the remedies available in federal courts.”). Similarly, medical monitoring is a form of relief for a tort, not an independent cause of action. *See, e.g., Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096, 1105 (2003) (California does not recognize an independent cause of action for medical monitoring). And the loss of consortium claims are obviously derivative. *See, e.g., Hahn v. Mirda*, 147 Cal. App. 4th 740, 746 (2007).

**C. Appellants' Complaints About the District Court's Analysis Are Meritless.**

The decision below was compelled by the law of this Circuit and consistent with cases from around the country holding preempted similar claims brought against the NFL and other sports entities. ER 15-17 (citing cases). Rather than provide a persuasive explanation as to how their common law claims could be resolved without interpreting the relevant CBAs, Appellants offer a series of arguments designed to collaterally attack the district court's straightforward application of this Court's precedents. None is persuasive.

*1. The District Court Did Not "Mischaracterize" Appellants' Claims or Engage in "Factfinding."*

Appellants first argue that the district court "misunderst[ood]" and "mischaracterized the complaint," which "infected every aspect of [the court's] analysis and eventual conclusion." Br. 8, 13. Specifically, they argue that the court relied on "irrelevant provisions of the CBAs" (Br. 25) because the NFL is the only defendant and "the NFL, not the clubs, engaged in the conduct at issue" (Br. 13). As the district court held in rejecting the same argument, that is "simply not true." ER 14.

Although Appellants "did not sue 'teams, team doctors or trainers,'" ER 14 (emphasis added), their allegations plainly implicate the actions of not only the NFL but also "clubs, doctors and trainers," ER 121. Accordingly, and consistent

with its responsibility to “investigate the true nature of the plaintiff’s allegations” to determine whether “the complaint actually raises a section 301 claim,” *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1048 (9th Cir. 1987), the district court identified the “nub” of Appellants’ allegations as being “that the NFL is responsible for, and acts through, the clubs’ medical staffs.” ER 14.<sup>7</sup>

Appellants now call this a “fundamental misperception.” Br. 8. If so, they labor under the same misperception, because that is how they characterized their own allegations: Appellants “sued the [NFL] because it directed clubs, doctors and trainers to keep players on, or return them to, the field and thereby maximize League profits at the sake of players’ health[.]” ER 121. As Appellants told the district court in the Joint Case Management Statement, they “allege, among other things, that [the NFL], through its doctors and trainers, directly and indirectly supplied players with, and encouraged players to use, certain medications and other

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<sup>7</sup> *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991) (Br. 11), does not prevent a district court from looking to the nature of a plaintiff’s claim. The district court in *Galvez* erroneously theorized that *assault and battery* claims were “premised upon such matters as disputes over union seniority and work assignments,” rather than focusing on the substance or specific elements of the claim for relief. *Id.* at 777. By contrast, analyzing the substance and specific elements of Appellants’ negligence and fraud claims here mandates preemption. *Hyles*, 849 F.2d at 1214; *see also Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) (“[T]o determine whether a purported state-law claim ‘really’ arises under Section 301, a federal court *must* look beyond the face of plaintiff’s allegations and the labels used to describe her claims and . . . evaluate the substance of plaintiff’s claims.”) (citation omitted).

pharmacological agents[.]” SER 2. Appellants argued that it was “the ‘doctors and trainers’ of each of the NFL’s 32 teams[] who provided and oversaw distribution of the Medications,” and that the NFL was liable for failing to exercise proper “control over the team doctors and trainers.” ER 293; *see also* ER 1315 (“doctors and trainers systematically” dispensed medications); 1316 (“the physicians employed by the NFL and its teams” violated ethical obligations); 1333 (“doctors and trainers” prescribed medications without proper disclosures); 1340 (the “doctors and trainers would push to return players to the field”); 285 (allegations concern NFL’s agents, including “the doctors and trainers of the NFL’s 32 teams”); 293 (“NFL is on notice of Plaintiffs’ claims for hiring and retention of team doctors and trainers”). Appellants cannot disavow their own pleadings and concessions on appeal, especially after declining the court’s invitation to amend their complaint.<sup>8</sup>

Next, Appellants attack the district court for engaging in what they claim is “impermissible fact-finding and weighing of evidence” about the “nature and extent of the NFL’s actions.” Br. 11-13. Cherry-picking snippets of the decision

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<sup>8</sup> If any doubt remains about the substance of Appellants’ claims, it is dispelled by the *Evans* lawsuit filed by Appellants’ counsel in Maryland federal court shortly after dismissal below, raising materially identical allegations but asserting that responsibility for their alleged deficient medical care lies not with the NFL, but with the Clubs and their medical staffs.

out of context, Appellants even suggest that the district court failed to grasp the proper standard governing a motion to dismiss. *Id.* That argument is specious.

The district court in no way “took stock of” (Br. 11) or resolved factual disputes about the NFL’s efforts. Instead, faithfully adhering to this Court’s precedent, the district court held only that to resolve plaintiffs’ claims, it would be necessary to take into account what the NFL had “affirmatively done” through the CBAs in resolving any negligence claim—“not just what it has not done.” ER 8; Br. 7 n.2 (conceding that the “parties agreed that [the court] could” review the CBAs on the dismissal motion). After all, the NFL’s duty to the players would be defined by what it had “affirmatively done” in the CBAs. The district court thus was not holding that, on the merits, the NFL’s commitments demonstrated that it had not breached any duties, but rather that its duties (if they exist at all) are entirely defined by the CBAs’ terms. Contrary to Appellants’ contention that the court “reached broad factual conclusions” (Br. 11) about the NFL’s liability, the district court simply held that the NFL’s arguments about its duties and obligations posed “a fair question of [CBA] interpretation.” ER 12. Such legal analysis is not factfinding.

2. *Appellants Mischaracterize The Preemption Standard Applied By The District Court.*

Appellants also suggest that the district court erred in finding their claims preempted based on “a defense or justification for conduct” rather than the

elements of their claims. Br. 17. But as Appellants' complaint makes clear, establishing the elements of their common-law claims, such as a duty of reasonable care and justifiable reliance, is not a *defense* to liability but rather part of Appellants' affirmative case. ER 1352 ("duty of reasonable care"); 1363-64, 1368 ("reasonable and justifiable reliance"); *see also Atwater*, 626 F.3d at 1182 ("[T]he scope of any duty the NFL owed Plaintiffs . . . is part of Plaintiffs' affirmative case[.]").

Appellants further suggest that the district court looked to CBA terms dealing with "the general subjects of medical care and player health" to find preemption. Br. 24-25. Appellants are wrong again. As already explained, the district court correctly determined that the *elements* and *substance* of Appellants' claims would require an analysis of the medical care and disclosure provisions governing what players were entitled to receive from Club physicians, the Clubs, and the NFL—provisions that thus speak directly to the state-law claims they brought. ER 12 (holding that "proper administration of drugs can reasonably be deemed to fall under the[] more general protections" addressing "medical care, player health, and recovery time").

3. *Appellants' Claims Are Not Independent Of The CBA Merely Because They Allege Statutory Violations As Components Of State-Law Torts.*

Notwithstanding the district court's considered preemption analysis, Appellants argue that CBA interpretation is unnecessary because they "premise their claims exclusively on the NFL's violation of federal and state statutory regimes governing Medications," including the Food, Drug and Cosmetic Act ("FDCA"), the Controlled Substances Act ("CSA") and the American Medical Association Code of Ethics applicable to physicians. Br. 20; ER 3. Even though these authorities provide no private rights of action, Appellants contend that they may use state tort law to enforce their "non-negotiable right," independent of the CBAs, to receive "conforming" medical care. Br. 19. But Appellants clearly did not bring claims grounded in non-negotiable statutory rights; and even if they had, their claims would nonetheless be preempted.

a. As an initial matter, Appellants did *not* "premise their claims exclusively on the NFL's violation of federal and state statutory regimes governing Medications." Br. 20. Although Appellants generally alleged that the NFL (acting with and through Clubs and their medical staffs) violated various statutes, Appellants brought no claims for breach of the statutes themselves. Instead, as the district court found, they alleged statutory violations "only as a step in an ordinary negligence theory," *i.e.*, "only as an antecedent and predicate for follow-on *state*

*common law claims.*” ER 19. They did not assert that these statutes imposed a duty of care directly on the NFL or replaced any elements of their common-law claims; instead, they argued that the NFL “*voluntarily*” “undertook the duty to act with *reasonable care* toward the Class Members.” ER 1367 (emphases added); *see also, e.g.*, ER 1352. In fact, when pressed about the source of the NFL’s duty at oral argument, Appellants’ counsel did not point to any statutes, but instead “repeatedly cited *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968),” ER 7, a common-law tort case regarding when a landowner owes a common-law duty to a physically injured lessor. ER 182-87 (explaining that “the source of the duty” “anchors in the question of the foreseeability that gives rise to a duty” as recognized in *Rowland*); *see also* ER 209-10 (similar).

Appellants’ belated attempt to rewrite their claims—after declining the district court’s offer to amend them—is also futile. As the district court recognized, neither the FDCA nor the CSA provides for a private right of action. ER 19 (“No right of action is allowed or asserted under the [FDCA or CSA] themselves.”); *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010) (no private right of action under FDCA); *United States v. Real Prop. & Improvements Located at 1840 Embarcadero, Oakland, California*, 932 F. Supp. 2d 1064, 1072 (N.D. Cal. 2013) (same under CSA).

Nor can Appellants create a *de facto* private cause of action by bootstrapping statutory violations into common law negligence and fraud theories. Appellants have never identified a statute that supposedly guarantees them a freestanding “right [] to receive conforming medical care” from the NFL, as they now contend. Br. 19. Indeed, despite having argued that their Complaint is premised “exclusively” on these statutes, Br. 20, Appellants fail to cite *any* provision of the CSA or FDCA that applies to the NFL.<sup>9</sup>

Thus, Appellants’ brief refers (without citation) to the NFL’s “statutory obligation to provide mandatory disclosures about Medications” to players. Br. 28. But they cite no statutory provision in their opening brief (or their Complaint) imposing such a duty on an entity like the NFL. Instead, they attach hundreds of pages of statutes and regulations to their opening brief that govern, for example, the obligations of medical professionals and “registrants” in distributing and

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<sup>9</sup> If Appellants’ claims really were premised “exclusively” on statutory violations, they would be subject to federal preemption for the independent reason that the statutes upon which they rely give sole enforcement authority to the federal government. *See, e.g., Perez v. Nidek Co.*, 711 F.3d 1109, 1118-19 (9th Cir. 2013) (California fraud claim based exclusively on violation of FDCA impliedly preempted because claim “exist[ed] solely by virtue of the FDCA disclosure requirements” and thus “amount[ed] to an attempt to privately enforce the FDCA”); *1840 Embarcadero*, 932 F. Supp. 2d at 1072 (“An action based purely on the CSA . . . amounts to a private enforcement action not allowed by the statute[.]”) (quotations omitted); *see also* 21 U.S.C. § 337 (stating that only the United States may enforce FDA laws or regulations); 21 U.S.C. §§ 871, 882 (stating that only the Attorney General or United States may enforce federal law governing controlled substances).

dispensing controlled substances, without any identification of how these provisions, which address the medical care provided by the Club doctors and trainers, could apply to the NFL. That is not sufficient to present or to preserve the argument that the Court would need look only to these statutes to determine the NFL's common-law liability. *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (court ordinarily declines to consider matters not specifically and distinctly raised and argued in opening brief).<sup>10</sup>

**b.** These obvious pleading deficiencies aside, Appellants' claims would fail even if, contrary to their complaint, they *had* relied "exclusively" on violations of nonnegotiable statutory rights. There is no dispute that a claim is not preempted when it can truly be resolved without interpretation of a CBA, such as when a finding of liability "is controlled only by the provisions of the state statute." *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1110-11 (9th Cir. 2000). But as Appellants' own authority makes clear, "[t]he fact of

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<sup>10</sup> Tellingly, Appellants' opening brief entirely fails to mention that they pleaded multiple violations of the American Medical Association Code of Medical Ethics (ER 1312-16, 1353, 1361, 1369), which apply only to doctors, not professional sports leagues. AMA Code of Medical Ethics § 1.01 (noting that the ethics opinions "lay out specific duties and obligations *for physicians*") (emphasis added). Moreover, the very fact that Appellants lumped together the federal statutes with the AMA Code underscores that Appellants were not relying on the statutes as imposing a distinct standard of care on the NFL, but were merely pointing to them as informing the NFL's supposed common-law duty—which is the most that the Code could do.

nonnegotiability alone is not a talisman for determining preemption.” *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1066 (9th Cir. 2007). The Supreme Court has explained that

a state could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be preempted.

*Lingle*, 486 U.S. at 407 n.7. Indeed, Appellants themselves elsewhere acknowledge that there are circumstances in which “interpretation of a CBA may be appropriate” to resolve a claim resting on “a non-negotiable statutory duty or right.” Br. 19 n.4.

As just one example, in *Brown v. Brotman Medical Center*, this Court affirmed the preemption of a claim “under § 6400 of the California Labor Code” that establishes a nonnegotiable statutory duty of care for employers to provide a safe and healthful place of employment. 571 F. App’x at 575-76 (noting that “plaintiffs have brought tort claims that alleged defendants violated a duty of care established by” statute). Although that claim was founded directly on a non-negotiable statutory right, it was nevertheless preempted because it would be “necessary for a court to interpret the terms of the CBA to determine the standard of care that [the employer] agreed to assume and, in turn, whether [its] actions

violated that duty.” *Id.*; *see also, e.g., Firestone v. S. Cal. Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000) (LMRA preempted claim based on California overtime pay statute); *Audette*, 195 F.3d at 1113 (LMRA preempted claim under Washington anti-discrimination statute).

Appellants counter that no CBA interpretation is required here because the CBA could not condone “illegal” behavior that violates federal or state statutes. Br. 23. But that argument misses the point. No one—not the NFL, and not the district court—ever suggested that the CBA does (or could) condone illegal behavior. Rather, the point is that claims seeking to establish the *NFL’s liability in tort* for the allegedly illegal conduct by physicians—whose conduct is regulated by those statutes—would be preempted. Establishing the elements of Appellants’ common law claims, including the existence and scope of the NFL’s supposed duty, would require interpretation of the meaning and import of dozens of CBA provisions that, among other things, place primary responsibility on Club physicians to disclose information and to comply with various statutory and ethical obligations (and place similar duties on the players themselves). “This line of interpretation has a ‘reasonable level of credibility,’ . . . and that alone is enough to trigger preemption.” ER 15 (quoting *Cramer*, 255 F.3d at 692).

c. This Court’s decisions finding statutory claims not preempted are distinguishable. Those cases involve statutes that imposed a duty on the defendant

and explicitly defined the duty at issue (usually in the context of employer wage payments or other duties), with no room for dispute over who was responsible for compliance. *See, e.g., Balcorta*, 208 F.3d at 1111 (plaintiff's claim for violation of statute that creates employer's duty to pay employees "within 24 hours" not preempted) (citing Cal. Labor Code § 201.5); *Humble v. Boeing Co.*, 305 F.3d 1004, 1008 (9th Cir. 2002) (statutory "reasonable accommodation" claim against employer not preempted, but common-law claims based on same conduct were); *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994) (statutory question of whether employer "'willfully fail[ed] to pay' [plaintiff's] wages promptly upon severance" independent of CBA) (quoting Cal. Labor Code § 203). "There were no terms in the statute to be interpreted with reference to the collective bargaining agreement, nor were there any terms of the collective bargaining agreement to be interpreted in light of the statute." *Firestone*, 219 F.3d at 1067 (distinguishing *Livadas*). As the district court recognized, that is not the case here. ER19.

Two of the cases on which Appellants rely—*Burnside* and *Cramer*—are illustrative. Neither involves common-law negligence or fraud claims, as here. *Burnside* involved straightforward statutory wage-and-hour claims (and a related conversion claim), brought by employees against their employer, alleging that the employees were not compensated for certain travel time in violation of a California statute. There was no dispute as to what the statute required or what obligations

the employer maintained under the statute, so no interpretation of the CBA was necessary. *Burnside*, 491 F.3d at 1074.

*Cramer* similarly involved claims brought by employees against their employer based on the California constitutional right guaranteeing the “inalienable” right to privacy to all persons (Cal. Const. Art. 1, § 1), as well as a specific provision of California criminal law that made the use of a “two-way mirror permitting observation of any restroom” a “*per se* violation of the penal code.” *Cramer*, 255 F.3d at 688, 695 (citing Cal. Penal Code § 653n). Although the Court acknowledged that certain “rights of privacy might well be subject to negotiation and be conditioned by the terms of a CBA,” no CBA interpretation was required in that case to find that an employer’s surreptitious placement of video cameras behind two-way mirrors in employee restrooms violated not only state criminal law, but also the employees’ constitutional right to privacy. *Id.* at 694.<sup>11</sup>

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<sup>11</sup> Appellants also heavily rely on *Humble* (Br. 14, 16, 17, 21, 36), but that case makes the very distinction the district court made here. In *Humble*, the court held that a statutory claim under Washington’s Law Against Discrimination (“WLAD”) was not preempted because no CBA interpretation “inhere[d] in the nature of Humble’s reasonable accommodation claim.” 305 F.3d at 1011. In contrast, the court found that Humble’s state-law outrage and negligent infliction of emotional distress claims were preempted *even if* they were “tacked on to the duties of reasonable accommodation established by the WLAD” statute. *Id.* Unlike the statutory claims based on the exact same conduct, those common law torts were preempted because their elements could not be adjudicated “independently of . . . the parties’ contractual expectations[.]” *Id.* at 1015.

Unlike those cases, the existence and scope of any duty the NFL owes to Appellants is not based exclusively on unambiguous statutory or constitutional duties governing “the employee-employer relationship.” *Humble*, 305 F.3d at 1007. To the contrary, the statutes Appellants invoke place no duty directly on the NFL, and the allocation of responsibility among the League, Clubs, doctors, trainers, and players can be ascertained only by interpreting the various CBA provisions. ER 15 (“because the CBAs expressly and repeatedly allocate so many health-and-safety duties” to Club medical staffs, interpretation of those provisions is necessary to determine what, if any, duty is owed by the NFL).

Appellants are therefore wrong in asserting that all that would be necessary for the NFL to be held liable for *common-law tort damages* would be to show a simple violation of the CSA, the FDCA, or unspecified “corresponding state statutes.” Br. 19. As the district court’s analysis makes clear, demonstrating a violation of one of these statutes in isolation by a physician or registrant covered by the statute would not demonstrate a common-law violation by the NFL, let alone resolve all of the elements of Appellants’ common-law claims. Although Appellants vaguely suggest that unspecified “non-negotiable statutory rights and duties [could] replace elements of state common-law claims” (Br. 33), they never explain how they could do so—nor refute the district court’s conclusion that doing so without interpreting multiple CBA provisions would be “impossible.” ER 23.

4. *Appellants Cannot Distinguish The Host Of Decisions Holding Similar Claims Against The NFL Preempted.*

Appellants also fail to distinguish the numerous federal cases that the district court cited that have held similar claims against the NFL preempted; later decisions simply confirm that the district court was correct.

In *Williams*, the Eighth Circuit held preempted common law negligence claims asserted against the NFL for the alleged failure to warn players about the harmful effects of a dietary supplement. 582 F.3d at 881. As here, the players asserted that the duty arose not from the CBA, “but from a duty that Minnesota law imposes on the NFL[.]” *Id.* The Eighth Circuit rejected the players’ argument, holding that “whether the NFL . . . owed the Players a duty to provide [] a warning [about a particular drug] cannot be determined without examining the parties’ legal relationship and expectations as established by the CBA[.]” *Id.*; *see also Atwater*, 626 F.3d at 1182 (recognizing that “determining the scope of any duty the NFL owed” former players regarding a CBA-created benefit would require the courts “to consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship”).

Appellants incorrectly characterize the district court’s reliance on *Williams* as assuming that the CBA “permitted the NFL to ignore its statutory obligation to provide mandatory disclosures about Medications” or “to determine whether Plaintiffs could have reasonably expected that the NFL would have followed the

law.” Br. 28. Not so. Even assuming the NFL owed some “statutory obligation to provide mandatory disclosures” to Appellants (and they have identified none), the district court held only that CBA interpretation was required to determine whether the players were justified in reasonably relying on *the NFL* (versus their physicians or the Clubs and in lieu of their own CBA rights to second medical opinions) for those disclosures. Appellants have no response to that holding.

Appellants’ attempts to distinguish *Stringer*, *Duerson*, and *Smith* fare no better. In *Stringer*, a wrongful death action sounding in negligence was held preempted by an Ohio federal court because “[t]he degree of care owed [by the NFL] cannot be considered in a vacuum,” but “must be considered in light of pre-existing contractual duties imposed by the CBA on the individual NFL clubs concerning the general health and safety of the NFL players.” *Stringer v. Nat’l Football League*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007). In *Duerson*, an Illinois federal court recognized that concussion-related negligence claims were preempted because the court could “plausibly interpret [the CBA’s health and safety] provisions to impose a duty on the NFL’s *clubs* to monitor a player’s health and fitness to continue to play football,” which “would tend to show that the NFL could reasonably rely on the clubs to notice and diagnose player health problems,” and which in turn could mean that the “NFL could then reasonably exercise a lower standard of care in that area itself.” *Duerson*, 2012 WL 1658353, at \*4

(emphasis added). Finally, in *Smith*, the district court held that assessing the scope of the NFLPA's duties in relation to plaintiffs' negligence and fraud claims—*i.e.*, the same types of common-law claims asserted here—“will substantially depend on interpretation of the CBA.” *Smith v. Nat'l Football League Players Ass'n*, No. 4:14-CV-01559, 2014 WL 6776306, at \*8 (E.D. Mo. Dec. 2, 2014).

Appellants claim that these cases “do not require the court to weigh whether the NFL's actions were reasonable” and thus the district court “failed to appreciate the difference between a tort claim employing a common-law reasonableness standard and a tort claim based on a statutory duty.” Br. 31; *id.* at 32 (arguing court “failed to appreciate” nature of its tort claims). Beyond offering an illusory distinction among what are all undisputedly common-law tort claims, Appellants here *did* allege a breach of a “duty to act with *reasonable care*” that the NFL supposedly undertook. ER 1352 (emphasis added).

Appellants also cite (Br. 34-35) two district court cases that declined to hold common law tort claims preempted. *Green v. Arizona Cardinals Football Club, LLC*, 21 F. Supp. 3d 1020 (E.D. Mo. 2014); *Green v. Pro Football, Inc.*, 31 F. Supp. 3d 714 (D. Md. 2014). But both are suits against Clubs (not the NFL) based on the specific facts of those cases: The latter declined to find preempted torts (battery and civil conspiracy to commit battery) that do not have any “duty” or “reliance” elements, 31 F. Supp. 3d at 727, while the former has been recognized

as an “outlier.” *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 392 n.46 (E.D. Pa. 2015) (citing *Green*, 21 F. Supp. 3d 1020). In any event, the weight of authority—including the subsequent *Smith* decision from the same Missouri federal court, *Smith*, 2014 WL 6776306—consistently holds similar claims against the NFL (and its member clubs) preempted.<sup>12</sup>

Indeed, just last month, an Illinois district court dismissed on LMRA preemption grounds a similar complaint against another sports league alleging the negligent administration of pain medications. *Boogaard v. Nat’l Hockey League*, No. 13-cv-04846, --- F. Supp. 3d ----, 2015 WL 9259519, at \*4, 7 (N.D. Ill. Dec. 18, 2015) (negligence claims preempted because they required interpretation of the

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<sup>12</sup> *E.g.*, *Smith v. Houston Oilers*, 87 F.3d 717, 721 (5th Cir. 1996) (players’ intentional tort claims against club preempted because “resolution of the players’ claims in this case of professional athletes is too dependent on an analysis of the CBA to escape § 301 preemption”); *Givens v. Tenn. Football, Inc.*, 684 F. Supp. 2d 985, 990-91 (M.D. Tenn. 2010) (player’s negligence claims against Club preempted because “[t]he questions raised by the Complaint, such as whether a physician’s failure to advise a player of his medical condition should be imputed to the club or whether the club has a duty independent of the physician to advise a player of his medical condition, are ‘inextricably intertwined’ with the provisions of the CBA”); *Jeffers v. D’Alessandro*, 681 S.E.2d 405, 414 (N.C. Ct. App. 2009) (player’s negligence claims against Club preempted because “the touchstone of [the player’s] claims – no matter how couched or labeled – is that the [Club] acted improperly in providing him medical care through the team physician,” and such “claims necessarily derive from the obligations in the CBA and will require analysis of the CBA in order to be resolved”); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1178 (N.D.N.Y. 1990) (player’s negligence claims against Club preempted because the Club “did not owe a duty to provide medical care to the plaintiff independent of the relationship established in the agreements,” and thus the court could not “resolve plaintiff’s claims based on inadequate medical care without interpreting the clauses establishing those duties”).

CBA “to determine whether the NHL actually had a duty” and “to determine the scope of any duty that the NHL had actually assumed”).

In sum, the district court’s analysis regarding the necessity of CBA interpretation is not only correct, but indistinguishable from the many cases finding that common-law causes of action against sports leagues cannot be decided without interpreting CBA provisions, including those establishing the relationship between players, physicians, Clubs, and the leagues under the CBAs.

## **II. APPELLANTS’ FAILURE TO EXHAUST MANDATORY CBA GRIEVANCE PROCEDURES INDEPENDENTLY REQUIRES AFFIRMANCE OF THE DISMISSAL ORDER.**

Appellants’ failure to exhaust the CBAs’ mandatory grievance and arbitration requirements provides an independent ground for affirmance. *United States v. Lemus*, 582 F.3d 958, 961 (9th Cir. 2009) (court can affirm on any basis supported by the record). As the district court held, “the types of claims asserted in the operative complaint are grievable in important respects under the various CBAs,” ER 20, and it is undisputed that Appellants failed to grieve these claims before bringing suit. Because the scope of the CBAs’ grievance provision, which requires arbitration of all disputes involving “compliance with” or “application of” the CBA, is even broader than the (already-broad) Section 301 preemption standard, dismissal would have been just as appropriate on failure-to-exhaust

grounds. *See, e.g., Boogaard*, 2015 WL 9259519, at \*9-11 (finding claim properly dismissed for failure to exhaust).

Because federal policy “strongly favors the resolution of labor disputes through arbitration,” *Matthews v. Nat’l Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012), Section 301 precludes parties from suing before exhausting bargained-for arbitration procedures, *Allis-Chalmers*, 471 U.S. at 219-21; *Carr v. Pac. Mar. Ass’n*, 904 F.2d 1313, 1317 (9th Cir. 1990). Where, as here, a party fails to exhaust mandatory grievance procedures, claims must be dismissed unless it can be said “with positive assurance” that the arbitration provisions are “not susceptible of an interpretation that covers the asserted dispute.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986). Only an “express exclusion” of a particular grievance or “the most forceful evidence of a purpose to exclude the claim from arbitration” will overcome the presumption of arbitrability where a CBA contains a broad arbitration clause. *Dennis L. Christensen Gen. Bldg. Contractor, Inc. v. Gen. Bldg. Contractor, Inc.*, 952 F.2d 1073, 1077 (9th Cir. 1991).

For more than forty years, every NFL CBA has included mandatory dispute resolution provisions requiring all disputes involving not just “the interpretation of,” but also “*application of, or compliance with,* any provision of” the CBAs, to be resolved exclusively in accordance with agreed-to arbitration procedures. ER

1271 (emphasis added). Even if the Court could resolve Appellants’ claims without “interpreting” the CBA provisions guaranteeing them medical care, at the very least those claims involve both the “application of,” and “compliance with,” the provisions. *Jeffers v. D’Alessandro*, 681 S.E.2d 405, 415 (N.C. Ct. App. 2009) (holding that player’s tort claims alleging inadequate medical care were subject to arbitration, even if not preempted, because “[e]ven if we were to agree with Jeffers that his claims do not involve an interpretation of the CBA, which we do not, ‘application’ cannot be read out of the contract”). Accordingly, the claims are within the scope of the mandatory grievance provisions.

Prior grievances brought by NFL players and the NFLPA—grievances that are part of the record by consent of both parties, ER 4, ER 31—confirm that disputes relating to player health and safety are subject to binding arbitration under the CBAs. For instance, as the district court recognized, lead plaintiff Richard Dent filed a grievance against his Club in 1995 with allegations that mirror the ones in this lawsuit, including failures to warn and the elevation of profits above the player’s personal health. ER 85-86 (alleging “improper” medical care based on Club’s and Club physician’s decision to return him to the field with a “clearly improper purpose” and without the required “written notification of the risk inherent at that time by continued performance”). The NFLPA has also asserted a similar grievance against the NFL and the Clubs involving the administration of

some of the same medications at issue in this case, alleging that both the NFL and the Clubs were violating the players' CBA-conferred rights to "such medical and hospital care . . . as the Club physician may deem necessary," as well as the right to have Club physicians comply with all local, state, and federal laws. *NFLPA v. NFL Clubs and NFLMC (Toradol Waivers)* (2012). ER 1225-30.

As the district court held, Appellants' claims were "grievable in important respects," ER 20, and Appellants do not squarely refute that finding. Br. 37 (claiming that grievance procedures are "irrelevant" "whether available . . . or not"); *see also* ER 177 (acknowledging that "if they had known of their claims at the time that they were covered by a CBA, maybe then, arguably, they could have grieved them"). Thus, regardless of whether Appellants are correct that "[t]he existence of a grievance process . . . is irrelevant to the preemption analysis," Br. 37, it would still not excuse their failure to exhaust under the contract to which their union agreed. *See* ER 19 (recognizing NFLPA's official position that "a player who has retired from the NFL may initiate and prosecute a grievance under the CBA if the retired player has a cognizable claim to grieve").

Given its preemption ruling, the district court had no need to rule on the "failure to exhaust" argument. Nevertheless, it accepted briefing by both parties on the issue, including supplemental briefing specifically ordered on the issue of whether Appellants' claims were grievable under the CBAs. ER 131-32. The

resulting record amply supports the conclusion that Appellants' claims fall squarely within the CBAs' broad arbitration provisions, and Appellants do not dispute that they failed to exhaust the CBAs' mandatory arbitration procedures. Appellants' failure to exhaust thus constitutes an independent basis to affirm the district court's dismissal.

### CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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January 29, 2016

### **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 12,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, 14 point Times New Roman.

Dated: January 29, 2016

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### **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, the National Football League states that there are no known related cases pending in this Court.

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 29, 2016

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